UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ANNALEE R.M. BLOOM et al.,	)	
Plaintiffs	)	
v.	)	Civil 99-CV-219-B
DAVID W. CROOK et al.,	)	
Defendants	)	

ORDER AND MEMORANDUM

BRODY, J.

Plaintiff, Annalee R.M. Bloom ("Annalee"), worked as an assistant district attorney under Defendant David W. Crook ("Crook"), the District Attorney for Kennebec and Somerset counties, and Defendant Evert Fowle ("Fowle"), the First Assistant District Attorney who was Annalee's immediate supervisor. In response to alleged discrimination in her employment and ultimate dismissal, Annalee and her husband, Lawrence P. Bloom, filed various claims against these two defendants, and Annalee also filed three claims against the state of Maine. Specifically, in Counts II, III, and IV of her complaint, Annalee alleges that Crook and Maine discriminated against her on the basis of her sex and religion in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq. and the Maine Human Rights Act, 5 M.R.S.A. § 3441 et seq. Before the Court is Maine's Motion to Dismiss these allegations against it under Fed. R. Civ. P. 12(b)(6).

STANDARD

When faced with a Motion to Dismiss brought pursuant to Fed. R. Civ. P. 12 (b)(6), the Court views all of the plaintiff's factual averments as true and indulges every reasonable inference in the plaintiff's favor. Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996). The Court may grant a defendant's Motion to Dismiss "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990).

STATUTORY FRAMEWORK

In order for Maine to be liable under Title VII and the Maine Human Rights Act, the Court must first find that Maine is Annalee's employer. The statute governing the power of District Attorneys ("DAs") provides that "district attorneys and assistant district attorneys designated as full-time assistants are full-time officers of the State." 30-A M.R.S.A. § 256. The DAs appoint assistant district attorneys ("ADAs") who "serve at the district attorney's will." Id. § 272(1). Along with this power to hire and fire, DAs also fix the compensation of ADAs, subject to approval of the Attorney General and the Governor. Id. at § 272(3). State legislative appropriations fund these salaries. DAs are elected in Maine, and are subject to removal by means other than the ballot box only when a majority of Justices of the Maine Supreme Court, upon a complaint filed by the Attorney General, find that certain conditions are satisfied that justify such a removal. Id. at § 257. Finally, although not directly related to personnel policy, the Attorney General does have the discretionary authority to act "in place of or with the district attorneys, or any of then, in instituting and conducting prosecutions for crime, and is invested, for that purpose, with all the rights, powers, and privileges of each and all of them." 5 M.R.S.A. § 199.

DISCUSSION

The parties do not agree on the appropriate standard to determine employer status under Title VII. Plaintiff urges the Court to follow Curran v. Portland Superintending School Committee, 435 F. Supp. 1063 (D. Me. 1977). The Court in that case denied the city of Portland's motion to dismiss, even though the school committee and the school superintendent had the responsibility and authority for the employment of teachers and other personnel, and the city was not permitted to become involved in the actual administration and management of the school system. Id. Nonetheless, the city appropriated funds for the school system, and these funds paid the salaries of school personnel. Id. The Court ruled that "it cannot be seriously doubted that the City is sufficiently involved in, and, in fact, necessary to, the total employment process that it must be considered plaintiff's employer for purposes of jurisdiction under Title VII." Id. (citations omitted).

Maine, on the other hand, argues that Curran adopted an outmoded or incorrect standard to determine employer status. Maine calls the Court to apply more recent standards adopted by the First Circuit in Rivera-Vega v. Conagra, Inc., 70 F.3d 153 (1st Cir. 1995), and Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico, 929 F.2d 814 (1st Cir. 1991), to determine Maine's status. These cases provide the following factors to determine joint employer status: "supervision of the employees' day-to-day activities; authority to hire, fire, or discipline employees; authority to promulgate work rules, conditions of employment, and work assignments; participation in the collective bargaining process; ultimate power over changes in employer compensation, benefits and overtime; and authority over the number of employees." Rivera-Vega, 70 F.3d at 163 (applying the NLRA test, which has been applied to Title VII -- see

Rivas, 929 F.2d at 820 n.15). In determining whether a state or state agency is liable for employment discrimination, Maine urges the Court to apply a Seventh Circuit test, which provides that "in suits against state entities, [the employer] is understood to mean the particular agency or part of the state apparatus that has actual hiring and firing responsibility." Hearne v. Board of Education of the City of Chicago, 185 F.3d 770, 777 (7th Cir. 1999) (under Title VII, plaintiff's employer was the city board of education, not the state, the governor, or the Illinois Educational Labor Relations Board). Maine argues that its payment of Annalee's salary is not sufficient to make it Annlee's employer. See Lee v. Mobile County Comm'n, 954 F. Supp. 1540, 1545 (S.D. Ala. 1995) ("The [Defendant] County Commission had no authority to hire, fire, transfer, promote, discipline, set terms, conditions and privileges of employment, or train [Plaintiff]. The mere duty to pay [Plaintiff's] salary through the budgeting of funds . . . does not mean that [Plaintiff] is deemed an employee of the . . . County Commission.").

The First Circuit does not appear to have distinguished between public and private employers in defining employer status under Title VII. The First Circuit has provided that employer status exists under Title VII where the party "exercise[s] control over an important aspect of employment." See Carparts Distribution Center, Inc. v. Automotive Wholesaler's Assoc. of New England, Inc., 37 F.3d 12, 17 (1st Cir. 1994) (an ADA case that drew on Title VII case law, finding "no significant difference between the definition of the term 'employer' in the two statutes"). Although a multi-factor test, the joint employer test of Rivera is at its core a "control" test.

Finding the Curran and the Hearne test too narrow, the Court adopts the Carparts test, using the Rivera factors, as the clearest expression of the law in this circuit regarding employer

status. Maine alleges that this statutory framework demonstrates that District Attorney Crook, not the state or the Attorney Generals' office, is Annalee's employer, and therefore Maine cannot be held liable under Title VII. While it is true that DAs can hire, fire, and set work policies for ADAs, the Attorney General and the Governor have the "ultimate power over changes in employer compensation" and the Maine also has "authority over the number of employees" that the DA can hire. Therefore, under the statutory authority of the Attorney General and the district attorney, the Court cannot conclude at this stage in the proceedings that the State is not Annalee's employer. See Curran, 435 F. Supp. at 1073 ("As only a motion to dismiss the complaint is presently before the Court, no factual determination of the presence or absence of an agency relationship between the individual defendants and the institutional defendants can be made. The relationship as alleged in the complaint, however, suffices to withstand dismissal at this stage.")

For the foregoing reasons, Maine's Motion to Dismiss is DENIED.

SO ORDERED.

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MORTON A. BRODY
United States District Judge

Dated this 9th day of December, 1999.